

U.S. DEPARTMENT OF COMMERCE
Office of Inspector General



**PUBLIC
RELEASE**

PATENT AND TRADEMARK OFFICE

*Efforts to Protect U.S. Intellectual Property
Rights Overseas Should Be Strengthened*

Final Audit Report No. BTD-11747/August 2000

Office of Audits, Business and Trade Audits Division



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EXECUTIVE SUMMARY

While the Patent and Trademark Office is primarily responsible for examining and granting patents and registering trademarks, it also plays an important advisory role. USPTO, through its Office of Legislative and International Affairs (OLIA), advises the Administration and the Congress on all domestic and international intellectual property matters, including international agreements. The Intellectual Property and Communications Omnibus Reform Act of 1999, enacted as part of P.L. 106-113, requires USPTO to advise the President, through the Secretary of Commerce, on national and certain international intellectual property policy issues and to advise federal departments and agencies on matters of intellectual property policy in the United States and intellectual property protection in other countries. OLIA works closely with the United States Trade Representative (USTR), the U.S. Customs Service, the U.S. Copyright Office of the Library of Congress, the Departments of State and Justice, and other federal agencies to secure and expand the protection of U.S. intellectual property throughout the world.

The United States has maintained a large surplus in international trade of intellectual property. In 1998, U.S. receipts from all trade in intellectual property were about \$36.8 billion, while U.S. payments were about \$11.3 billion. From 1990 to 1998, U.S. receipts from all trade in intellectual property were on average almost four times U.S. payments to foreign firms for intellectual property. About 75 percent of these transactions involved exchanges of intellectual property between U.S. firms and their foreign affiliates. With regard to exchanges between unaffiliated firms, the United States is also a net exporter of technology sold as intellectual property. From 1990 to 1998, royalties and fees received from unaffiliated foreign firms were, on average, over three times those paid by U.S. firms to foreigners for access to their technology. However, this trend does not reflect trade losses due to piracy of U.S. intellectual property.

Piracy can be defined as a violation of laws designed to protect the intellectual property rights of the creators of the intellectual property. The International Intellectual Property Alliance, a coalition of seven trade associations, each representing a significant segment of the copyright industry in the United States, estimated that five U.S. copyright-based industries suffered trade losses due to piracy of more than \$12 billion in 62 selected countries in 1998. Developing countries are responsible for almost \$8.8 billion of these estimated losses from copyright piracy.

OLIA has provided technical assistance to developing countries that are setting up or trying to improve their intellectual property protection systems. This technical assistance includes training programs in the United States, on-site assistance, and reviews of foreign laws and regulations to implement intellectual property enforcement regimes. In fiscal year 1999, OLIA provided technical assistance to over 70 countries through 90 projects.

OLIA has also worked closely with the World Intellectual Property Organization (WIPO) to cosponsor training programs on the enforcement of intellectual property rights, and in fiscal year

1999 developed a new intellectual property enforcement training format to be used by other U.S. agencies and WIPO. In addition, OLIA has shared information with other agencies involved in providing enforcement training.

The purpose of this review was to determine whether USPTO's international operations related to intellectual property protection were being carried out in an efficient and effective manner. Specifically, we evaluated OLIA's international training and technical assistance efforts, its efforts to monitor compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), its communication and coordination with other federal agencies involved in protecting intellectual property rights, and its staffing requirements.

In general, we found that OLIA is highly respected for its expertise in international intellectual property protection issues applied through its training and analytical activities and its critical involvement in international agreement negotiation and the drafting of implementing legislation and regulation. Recipients of OLIA's advice and assistance, including officials at other U.S. government agencies, trade associations, and foreign governments, expressed a high degree of satisfaction with OLIA's global activities. However, a few issues warrant management's attention in order to maximize OLIA's efficiency and effectiveness. Our findings and recommendations are as follows:

OLIA's international training efforts need improvement. OLIA officials indicated that because they receive more requests for training than they can fulfill, they must deny certain requests. However, OLIA has not kept records of denied requests and could not document the number and types of training requests denied or the sources of those requests. In addition, OLIA officials expressed inconsistent views regarding the determination of training priorities. Officials at both OLIA and other federal agencies expect requests for training to increase now that the January 2000 deadline for World Trade Organization developing country members to comply with the TRIPS Agreement has passed. Thus, it becomes increasingly important that OLIA officials establish adequate controls over requests for training to ensure that all requests receive appropriate consideration. In addition, in order to provide training that will have the most impact on the protection of intellectual property rights, OLIA needs to establish and implement a system for prioritizing requests for training (see page 9).

Because OLIA's training resources are limited, we believe that it should consider alternative training methods to maximize the impact of its training. These methods might include increasing the use of joint training sessions with WIPO and industry associations, using contractors to conduct training seminars, and using Internet technology for training (see page 10).

The Treasury and General Government Appropriations Act for fiscal year 2000 established the National Intellectual Property Law Enforcement Coordination Council and named the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark

Office as a cochair, along with the Assistant Attorney General, Criminal Division. The act states that the Council shall coordinate domestic and international intellectual property law enforcement among federal and foreign entities. We believe that USPTO should seek clarification of the Council's role in coordinating international intellectual property law enforcement training. In response to the draft report, OLIA officials told us that the Council members agree that improved coordination of law enforcement training is critical, and the Council is adopting a plan to address the shortcomings in the current coordination effort (see page 11).

OLIA has not yet developed performance measures for its responsibilities that would comply with the Government Performance and Results Act of 1993 (GPRA). OLIA measures the number of training and technical assistance activities, but not the results of these activities. To meet GPRA requirements, OLIA should develop procedures to measure the results of its efforts to protect intellectual property rights. OLIA should request that the Council develop a system for measuring the long-term effectiveness of training efforts (see page 12).

Improvements are needed in controls over federal agencies' requests for advice and analysis. While OLIA provides substantial and satisfactory advice and analysis to other federal agencies, it has not maintained adequate controls over these requests and the results. Consequently, there was insufficient documentation for its analyses, and we were unable to determine the number of requests received from other agencies or the number denied. Further, most of the requests received from other agencies are oral, and many require an urgent response. Requests are often phoned directly to individual staffers, occasionally resulting in duplication of effort when requests from the same agency are phoned to more than one OLIA official. Priorities are not established for these requests, and there are no controls to ensure that these requests are completed in a timely manner. Although OLIA officials indicate they need more resources, they were unable to provide documentation to support their claims. With increased requests anticipated, OLIA officials should ensure that requests for assistance are adequately controlled, and should document the results of their analyses of draft foreign laws and regulations governing intellectual property rights. As we ended our fieldwork, OLIA established a system that tracks due dates and completion dates for each staff person's projects (see page 14).

OLIA should initiate discussions toward a strategy to monitor and report TRIPS compliance by developing countries. There is no legal requirement that OLIA systematically monitor and periodically report compliance prior to the TRIPS Agreement deadlines of January 1, 2000, for developing countries, and January 1, 2006, for least-developed countries. In the absence of such a requirement, OLIA has reviewed developing countries' draft legislation on a country-by-country basis upon request, but has not assessed all such countries' compliance since the agreement's implementation in 1995. As a result, OLIA is unable to provide an assessment of these countries' legal and technical compliance at any given moment from 1995 to 2000. Such a report, though not legally required, would have provided a stronger basis for determinations of policy initiatives and for efficiently allocating training and enforcement resources.

Private sector officials have emphasized the importance of TRIPS compliance to protect intellectual property rights, and a recent General Accounting Office report recommended a better strategy for managing the growing workload for all trade agreements. With an improved strategy for monitoring and reporting compliance by developing countries, OLIA and USPTO will be better able to fulfill the advisory mission mandated in the Intellectual Property and Communications Omnibus Reform Act of 1999. OLIA, USTR, and the other government agencies will then have more complete information with which to formulate policies and enforcement mechanisms to protect intellectual property rights in those countries. Additionally, OLIA will also be more assured that its training funds will be efficiently allocated to the most critical countries and issues (see page 17).

In response to our draft report, USPTO generally agreed with the findings and recommendations and requested minor changes. We agree with the changes and, where appropriate, have incorporated them into the final report. Our detailed recommendations for action by the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office are on pages 12, 16, and 19.

INTRODUCTION

This report presents the results of our performance audit of the United States Patent and Trademark Office's international operations related to intellectual property protection. While USPTO is primarily responsible for examining and granting patents and registering trademarks, it also plays an important advisory role. Through its Office of Legislative and International Affairs (OLIA), USPTO advises the Administration, including the U.S. Trade Representative, and the Congress on all domestic and international intellectual property matters, including international agreements. The Intellectual Property and Communications Omnibus Reform Act of 1999, enacted as part of P.L. 106-113, requires USPTO to advise the President, through the Secretary of Commerce, on national and certain international intellectual property policy issues and to advise federal departments and agencies on matters of intellectual property policy in the United States and intellectual property protection in other countries.

The audit was conducted in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States, and was performed under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

BACKGROUND

OLIA works closely with the United States Trade Representative (USTR), the U.S. Customs Service, the U.S. Copyright Office of the Library of Congress, the Departments of State and Justice, and other federal agencies to secure and expand protection of U.S. intellectual property throughout the world. OLIA also works with other agencies on bilateral and other multilateral matters, such as issues concerning the Asia-Pacific Economic Cooperation, the Free Trade Area of the Americas, and the Organization for Economic Cooperation and Development. In addition, OLIA engages in substantive discussions and education efforts with intellectual property officials throughout the world.

Toward the end of fiscal year 1999, OLIA had 15 professional, 1 administrative, and 4 support staff, as well as an Administrator and a Deputy Administrator, engaged in international activities. Two professional positions were vacant. OLIA also receives some technical support from the International Liaison Staff, which reports to the Deputy Assistant Commissioner for Patent Policy and Projects.

According to the World Intellectual Property Organization (WIPO), the United Nations agency promoting the protection of intellectual property throughout the world, intellectual property has two main branches: *industrial property*, chiefly in inventions, trademarks, industrial designs, and appellations of origin, and *copyright*, chiefly in literary, musical, artistic, photographic, and audiovisual works.

USPTO administers the laws relating to patents and trademarks, while the Copyright Office of the Library of Congress registers copyrights. Because intellectual property rights are territorial in nature, U.S. patents, trademarks, and copyrights are effective only within the United States and its territories and possessions. Almost every country has its own such law, and an inventor who wishes protection in other countries must apply in each of the other countries or in regional offices, such as the European Patent Office, or use the system established by the Patent Cooperation Treaty, a filing convention that permits applicants to secure applications in over 100 countries by filing a single application in their national office.

As required by the Intellectual Property and Communications Omnibus Reform Act of 1999, USPTO advises the Administration on national and certain international intellectual property policy issues. Since the Copyright Office is a part of the legislative branch of the federal government, USPTO is the chief advisor to the Administration on domestic copyright legislation and international copyright issues. A 1997 Presidential directive charged the Secretary of Commerce with seeking the protection of copyrights in the digital environment by working for ratification of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in the United States and overseas.

Trade and Intellectual Property

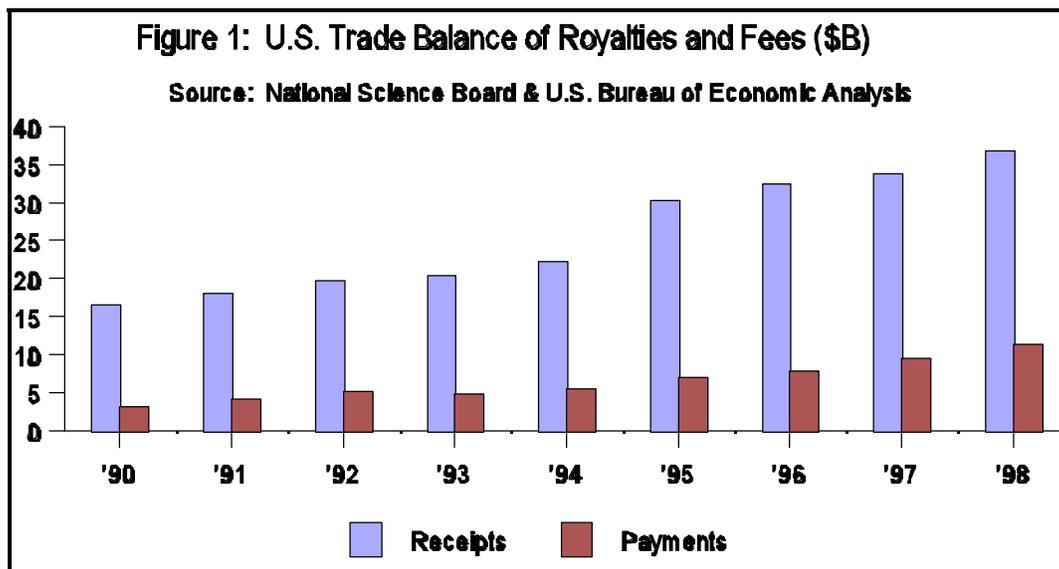
Firms become involved in the international trade-related aspects of intellectual property when they sell products containing intellectual property abroad or license or establish franchise arrangements that involve proprietary technologies, trademarks, and entertainment products to entities in other countries. These transactions generate revenues in the form of royalties and licensing fees.¹ International licensing and royalty payments worldwide increased from \$7 billion in 1976 to more than \$60 billion in 1995.² At the end of 1994, about 3.9 million patents of invention were in force worldwide, and over 80 percent of them had been granted by USPTO, the states of the European Patent Convention, and the Japanese Patent Office.³

¹ *Science & Engineering Indicators - 1998*, NSB 98-1, National Science Board, National Science Foundation (Arlington, VA: 1998), p. 6-14.

² *World Development Report 1998/99*, The International Bank for Reconstruction and Development/The World Bank (New York: Oxford University Press, Inc., 1999), p. 8.

³ [Http://www.european-patent-office.org/trint.htm](http://www.european-patent-office.org/trint.htm), October 4, 1999.

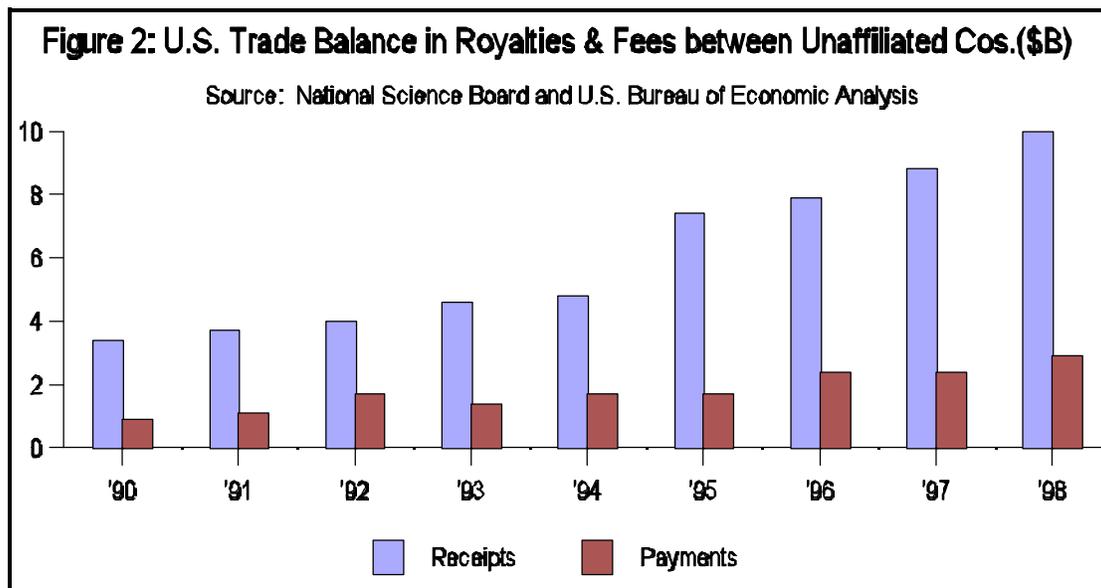
The United States has maintained a large surplus in international trade for products that contain intellectual property. In 1998, U.S. receipts from all trade in intellectual property were about \$36.8 billion, while U.S. payments were about \$11.3 billion⁴ (see Figure 1). From 1990 to 1998, U.S. receipts from all trade in intellectual property averaged almost four times U.S. payments to foreign firms for intellectual property. About 75 percent of these transactions involved exchanges of intellectual property between U.S. firms and their foreign affiliates. According to the National Science Foundation, this trend suggests a growing internationalization of U.S. business and a desire to retain control of any intellectual property leased overseas.⁵



With regard to exchanges between unaffiliated firms, the United States is also a net exporter of technology sold as intellectual property. In 1998, U.S. receipts for royalties and fees from unaffiliated foreign firms were about \$10 billion, while U.S. payments to unaffiliated foreign firms were about \$2.9 billion (see Figure 2). From 1990 to 1998, royalties and fees received from unaffiliated foreign firms were, on average, over three times those paid by U.S. firms to unaffiliated foreign firms for access to their technology. However, these statistics do not capture trade losses due to the widespread piracy of U.S. intellectual property.

⁴ *Science & Engineering Indicators - 1998*, Appendix table 6-7 for 1990-94 data. *Survey of Current Business*, U.S. Bureau of Economic Analysis, Vol. 79, No. 10 (October 1999), for 1995-98 data.

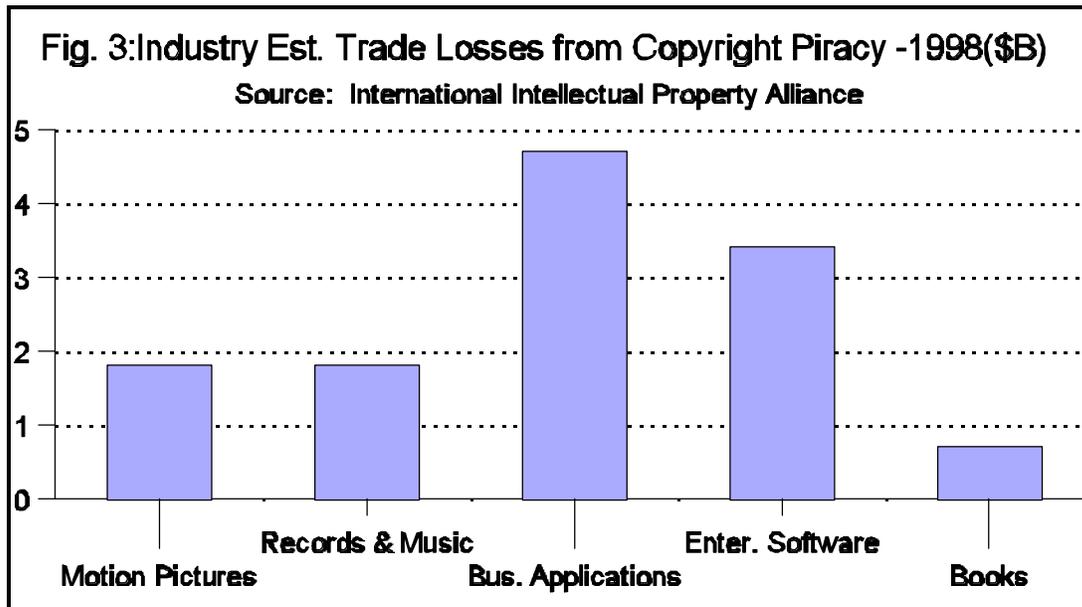
⁵ *Science & Engineering Indicators - 1998*, p. 6-15.



Piracy can be defined as a violation of laws designed to protect the rights of the creators of the intellectual property. The International Intellectual Property Alliance, a coalition of seven trade associations,⁶ each representing a significant segment of the copyright industry in the United States, estimated that five U.S. copyright-based industries suffered estimated trade losses due to piracy of more than \$12 billion in 62 selected countries in 1998⁷ (see Figure 3). Developing countries are responsible for almost \$8.8 billion of these estimated losses from copyright piracy.

⁶ Formed in 1984, the International Intellectual Property Alliance (IIPA) consists of the former American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Interactive Digital Software Association, the Motion Picture Association of America, the National Music Publishers' Association, and the Recording Industry Association of America.

⁷ "IIPA 1999 'Special 301' recommendations, IIPA 1997-1998 Estimated Trade Losses Due to Piracy and 1997-1998 Levels of Piracy," written submission submitted to Assistant USTR for Services, Investment and Intellectual Property, February 16, 1999.



Intellectual Property and the Special 301 Process

Section 1303 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418) requires USTR to identify foreign countries that “deny adequate and effective protection of intellectual property rights” or “deny fair and equitable market access to United States persons that rely upon intellectual property protection.” The annual review of foreign country practices required by the amendment is known as a “Special 301” annual review. USTR must make its Special 301 determinations by April 30 of each year.

In conjunction with the Special 301 annual review, Section 313 of the 1994 Uruguay Round Agreements Act (P.L. 103-465) requires that USTR report to the Congress on actions taken during the previous 12 months and the progress achieved in providing improved intellectual property rights protection and market access for persons relying on such rights. USTR has used the Special 301 process to identify 13 intellectual-property-related cases to bring to the dispute settlement process of the World Trade Organization (WTO).⁸

⁸ WTO provides the institutional framework for the multilateral trading system. It administers rules for international trade, provides a mechanism for settling disputes, and provides a forum for conducting trade negotiations. WTO succeeded the General Agreement on Tariffs and Trade, which had provided the institutional framework for world commerce since 1948.

Intellectual Property Protection in the International Arena

On January 1, 1995, after more than eight years of negotiations, the WTO was established, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁹ was concluded. The TRIPS Agreement requires all WTO members to provide both certain standards of protection for patents, copyrights, trademarks, and other intellectual property rights and effective enforcement of these rights. In addition, the agreement allows members to resolve disputes concerning the TRIPS Agreement through WTO's dispute settlement provisions.

The TRIPS Agreement incorporated by reference most provisions of the two main preexisting intellectual property conventions administered by WIPO—the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886. WTO also concluded an agreement with WIPO, effective January 1996, that provided for cooperation between the two organizations, especially with regard to implementation of the TRIPS Agreement by developing countries.

Developed country members were obligated to comply with the provisions of the TRIPS Agreement by January 1996. Transitional arrangements were allowed for developing countries with regard to certain provisions of the TRIPS Agreement. Members considering themselves developing countries or in the process of transforming from a centrally planned to a market, free-enterprise economy had until January 2000 to comply with the TRIPS Agreement. Least-developed country members have until January 2006. According to OLIA, by January 2000, 75 to 80 developing countries should have demonstrated that their intellectual property regimes, including their enforcement systems, comply with the TRIPS Agreement. As of December 1999, WTO had 135 members.

⁹ The areas of intellectual property covered include copyright and related rights; trademarks, including service marks; geographical indications; industrial designs; patents, including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information, including trade secrets and test data.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objective of this performance audit was to determine whether PTO's international operations related to intellectual property protection were being carried out in an efficient and effective manner. The scope of our audit included a review of OLIA's international training efforts, its efforts to monitor the compliance of WTO members with TRIPS, its communication and coordination with other organizations involved in issues related to intellectual property protection, and its staffing requirements.

Our review methodology included interviews with OLIA staff, as well as officials from other Commerce agencies: the international liaison staff of PTO's Deputy Assistant Commissioner for Patent Policy and Projects; the Trade Compliance Center and the U.S. and Foreign Commercial Service of the International Trade Administration; the Office of General Counsel, including the Commercial Law Development Program; and the National Telecommunications and Information Administration. In addition, we interviewed officials from the Office of the U.S. Trade Representative; the Department of State, including the U.S. Agency for International Development; the U.S. Copyright Office; and the Federal Bureau of Investigation. We also interviewed an official from WIPO and officials from the following industry associations: American Bar Association, American Intellectual Property Law Association, American Library Association, Business Software Alliance, International Intellectual Property Alliance, International Trademark Association, and the Recording Industry Association of America. Our audit was conducted from July through December 1999 in Washington, D.C., and at PTO's headquarters in Crystal City, Virginia.

We reviewed applicable laws, regulations, policies, and procedures. We examined selected files and records and reviewed other appropriate documentation. We did not review in detail the effectiveness of internal controls over financial matters, because they were not directly related to our audit objective. Nor did we assess the reliability of computer-generated data because such data was not pertinent to our review. We found that OLIA has not met all requirements of the Government Performance and Results Act of 1993 (GPRA), as discussed on page 12, but has complied with other applicable laws and regulations.

FINDINGS AND RECOMMENDATIONS

As noted earlier, OLIA plays an important advisory role on domestic and international intellectual property matters. According to USTR officials, OLIA's expertise has been essential to international negotiations involving intellectual property protection. OLIA has also worked closely with WIPO to cosponsor training programs on the enforcement of intellectual property rights and developed a new enforcement training format in fiscal year 1999 to be used by other U.S. agencies and WIPO. In addition, OLIA has shared information with other agencies involved in providing enforcement training.

OLIA has also provided training to developing countries that are setting up or trying to improve their intellectual property protection systems. This assistance includes training programs in the United States, on-site seminars in the developing countries, and reviews of foreign laws and regulations to implement intellectual property enforcement regimes. In fiscal year 1999, OLIA provided training to over 70 countries through 90 projects.

In general, we found that OLIA is highly respected for its expertise in international intellectual property protection issues applied through its training and analytical activities and its critical involvement in international agreement negotiation and the drafting of implementing legislation and regulation. Recipients of OLIA's advice and assistance, including officials at other U.S. government agencies, trade associations, and foreign governments, expressed a high degree of satisfaction with OLIA's global activities. However, a few issues warrant management's attention in order to maximize OLIA's efficiency and effectiveness.

I. OLIA's International Training Efforts Need Improvement

The TRIPS Agreement requires developed-country members to provide technical cooperation to developing and least-developed country members in order to facilitate the agreement's implementation. Such cooperation includes assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights and support for the establishment or reinforcement of domestic offices and agencies relevant to these matters.¹⁰ The Intellectual Property and Communications Omnibus Reform Act of 1999 (hereafter referred to as "the 1999 Reform Act") provides that USPTO may conduct programs, studies, or exchanges of items or services regarding domestic and international intellectual property law and the effectiveness of intellectual property protection domestically and throughout the world.

OLIA has provided such assistance for many years and started an enforcement training program about three years ago, and has conducted an increasing number of training sessions for

¹⁰ TRIPS Agreement, Article 67.

developing countries, as shown in the following table. Most of its training has been on a bilateral basis, i.e., provided to an individual country. An OLIA official said, however, that OLIA would like to conduct more of its training through regional seminars because it can reach more countries with the same resources.

Fiscal Year	Training Sessions in U.S.		On-Site Seminars in Developing Countries	
	Bilateral	Regional	Bilateral	Regional
1997	19	6	13	1
1998	31	3	31	2
1999	55	5	10	5

A. System for Documenting and Prioritizing Requests for Training Is Needed

OLIA officials indicated that because they receive more requests for training than they can fulfill, they must deny some requests. However, OLIA has not kept records of denied requests; therefore, it could not document the number and types of training requests denied or the sources of those requests.

OLIA officials expressed inconsistent views regarding the determination of training priorities. Two OLIA officials said that they were not aware of any prioritization system; one of these said that whether she responded to training requests depended on her existing work. Several others said that training allocations were determined by Administration priorities, e.g., the Africa Commercial Strategy resulted in many African countries receiving training seminars. Other OLIA officials cited one or more of the following factors as being used to determine training priorities:

- A country's market size and infrastructure.
- The perceived severity of problems in one or more intellectual property areas.
- Countries identified in Special 301 process.
- Industry requests, priorities, and efforts.
- Availability of funds from external sources such as WIPO.

Officials at both OLIA and other federal agencies expect requests for training to increase now that the January 2000 deadline for WTO developing country members to comply with the TRIPS Agreement has passed. Industry officials interviewed said that it was important to them that developing countries become compliant with the TRIPS Agreement as soon as possible, and regarded the training provided by OLIA and others as critical to this process. With the passage of

the January 1, 2000, deadline, and recognizing the critical need to assist developing countries to meet their obligations to comply with enforcement provisions of the TRIPS Agreement, OLIA is expanding its Visiting Scholars and Enforcement Training Program, which is co-sponsored with WIPO, from an annual session to biannually. It is designed for high-level government officials responsible for implementing the TRIPS Agreement in their countries.

With the additional workload anticipated, it becomes increasingly important that OLIA officials establish adequate controls over requests for training to ensure that all requests get appropriate consideration. In addition, in order to provide training that will have the most impact on the protection of intellectual property rights, OLIA needs to establish and implement a system for prioritizing such requests.

B. *OLIA Should Consider Adding Alternative Training Methods*

Because OLIA currently has insufficient resources to meet the demand for TRIPS-compliance training by developing nations, we believe that it should also consider adding alternative training methods to maximize the impact of its training. OLIA's training sessions have involved either participants from other countries traveling to the United States or OLIA officials traveling abroad to conduct seminars. Such methods necessarily limit the number of trainees and the potential impact of OLIA's expertise. For instance, the Visiting Scholars Program has trained officials from fewer than 20 countries at its annual session.

Adding alternative training methods would enable OLIA to increase the number of developing countries with which it could share its intellectual property rights knowledge. These alternative methods should include joint training sessions with WIPO and industry associations, Internet technology and other digital delivery methods, and contractors who conduct the seminars. According to a 1999 Department of Education study, "distance education" using the Internet is an increasingly visible feature of postsecondary education in the U.S., and Internet-based technologies will be a growing mode of delivery among these institutions.

There are practical considerations to using these alternative means. OLIA officials told us that they are developing "distance-learning" training programs, but many developing countries still do not have fully developed Internet technology available for use. We think that officials from those countries could gather in a single location for training seminars that are less expensive than travel to the U.S. Use of professional-quality videos and interactive CDs, combined with paper materials in native languages, is also an option in such countries. OLIA officials have also found that some contractors have not ensured accuracy in their training presentations and were unwilling to promote U.S. Government policy objectives. We think that those issues must be considered when contracting for assistance, and contractor performance must always be monitored.

C. *Interagency Coordination of Enforcement Training Needs Improvement*

Although an OLIA official told us that there is coordination of enforcement training through an interagency committee, three officials from other federal agencies said that agencies with international training programs just share information and do not coordinate training efforts. According to one of those officials, the committee does not really coordinate because the many agencies involved have different agendas and different funding sources. This official believed that a governmentwide review of training funds should be conducted to ensure that such funds are distributed broadly, and not just to certain strategic countries. In his opinion, a disproportionate amount of training funds is spent on certain countries because of strategic, rather than economic, considerations. He felt that training funds should be spent in proportion to a country's economic importance and its threat to U.S. intellectual property rights, not because of other strategic considerations.

The Treasury and General Government Appropriations Act for fiscal year 2000 established the National Intellectual Property Law Enforcement Coordination Council. Cochairs are the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office and the Assistant Attorney General, Criminal Division. The Council also includes representatives from the State Department, USTR, Customs, and the International Trade Administration. The act states that the Council shall coordinate domestic and international intellectual property law enforcement among federal and foreign entities. While the OLIA Administrator believed that this Council will coordinate intellectual property rights enforcement training among the involved agencies, officials from the other agencies were not clear as to the Council's role.

In response to our draft report, OLIA officials told us that the Council members agree that improved coordination of law enforcement training is critical, and the Council is adopting a plan to address the shortcomings in the current coordination effort. The plan includes expanding the role of the existing interagency committee to achieve more comprehensive and efficient record-keeping to avoid duplicative training, and improved tracking of U.S. government training funds to better allocate them consistent with relevant considerations and priorities. Additionally, OLIA will chair a new subcommittee to address program development and curriculum standardization issues, develop methods for measuring the effectiveness of enforcement training, and develop a governmentwide strategy for selecting training targets and conducting the most efficient and effective training possible. The subcommittee will also coordinate with international organizations, such as WIPO, to maximize U.S. government resources in the international training arena.

D. *Performance Measures Compliant with GPRA Are Needed*

OLIA should continue its efforts to develop performance measures for its areas of responsibility that would comply with the Government Performance and Results Act. Such measures would enable OLIA management to better evaluate the efficiency and effectiveness of its efforts to encourage improvements in the protection of intellectual property worldwide.

GPRA requires that, beginning with fiscal year 1999, each agency prepare an annual performance plan covering each program activity set forth in its budget. In addition to establishing performance indicators to be used in measuring or assessing the relevant outputs, GPRA states that such a plan should establish the outcomes of each program activity. OLIA measures the number of training activities, but it has not yet established procedures to measure the results of these activities.

We realize that agencies involved in providing training face the difficulty of determining the practical impact of training programs. OLIA has started requesting evaluations from participants in its training programs in October 1999, to evaluate the short-term effectiveness of its programs. Most of the participants in two training sessions held in late 1999 and two sessions in the spring of 2000 wrote that they were “highly or very satisfied” with the sessions. OLIA also asked these participants for suggestions to improve future training. One participant suggested that OLIA continue to communicate with participants in the future. We urge OLIA to continue its efforts to develop a systemized method to determine what changes in their laws or regulations may have occurred and whether prior training contributed to those changes. OLIA should request that the National Intellectual Property Law Enforcement Coordination Council develop a system for measuring the long-term effectiveness of training efforts.

E. *Recommendations*

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office direct the Administrator of the Office of Legislative and International Affairs to:

1. Implement procedures to track and prioritize incoming requests for international training.
2. Consider adding alternative training methods to maximize its training resources, including (a) increasing the use of joint training sessions with WIPO and industry associations, (b) using contractors who are experts in intellectual property and can be relied upon to promote U.S. government objectives to conduct training seminars, and (c) using Internet-technology and other methods for long-distance education for training.

3. Continue to develop measures to track results related to its efforts to improve the enforcement of intellectual property rights worldwide.

We also recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, in his role as cochair of the National Intellectual Property Law Enforcement Coordination Council, confirm his understanding of the Council's role in coordinating training in international intellectual property law enforcement and provide clarification of the Council's role to the other agencies involved.

F. *PTO Response and OIG Analysis*

PTO generally agreed with the findings and recommendations and requested minor changes. We agree with the changes and have incorporated them into the final report.

II. Improvements Are Needed in Controls Over Federal Agencies' Requests for Advice and Analysis

The 1999 Reform Act requires USPTO to advise federal agencies on matters of intellectual property policy in the United States and intellectual property protection in other countries. Although OLIA provides substantial and satisfactory advice in response to requests from other federal agencies, including requests to analyze draft laws and regulations over intellectual property rights, it has not maintained adequate controls over these requests and the results. Consequently, there is insufficient documentation for the advice given to the other agencies, and we were unable to determine the number of requests received from other agencies, the number of requests denied, or the timeliness of responses to requests. Further, OLIA officials indicated that most of the requests they receive from other agencies are oral, and many requests require an urgent response. Also, according to OLIA officials, requests for advice have often been phoned directly to individual staffers, occasionally resulting in duplication of effort when requests from the same agency are phoned to more than one OLIA official. OLIA also has not sufficiently documented its analyses of draft foreign laws and regulations governing intellectual property rights.

While OLIA had an administrative system for tracking incoming correspondence, OLIA did not, during our fieldwork, have a system to track oral requests for advice received from other federal agencies. As a result, there was no record of their receipt and no due date established for their completion. Without a tracking system, priorities cannot be established for these requests, and there are no controls to avoid duplication of effort on the part of OLIA staff receiving requests for advice directly from other federal agencies. OLIA initiated a tracking system as our fieldwork ended.

In addition, due to OLIA's informal process for handling oral requests, there were insufficient controls to ensure that these requests are completed in a timely manner, and we could not assess the timeliness of OLIA's responses to oral requests from other agencies. We examined the timeliness of OLIA's responses to written requests controlled by USPTO for the six-month period of May to October 1999. About 37 percent of controlled requests assigned to OLIA, such as replies to Congressional inquiries and other correspondence on international intellectual property issues, were not processed within the assigned period. OLIA staff recognize that such requests should be processed in a more timely manner.

Reviewing one of OLIA's files, we found that the request for advice had been sent directly to the OLIA staffer without OLIA management assigning it a priority level. According to this staffer, OLIA did not have a policy regarding such direct requests, but staffers generally mentioned such requests to their managers. However, such requests were not logged in, and the time spent on their responses was not measured. Also, the request was not reported unless the staffer mentioned it in the weekly activity report.

While officials at other federal agencies said they valued OLIA's expertise, several added that they do not always receive OLIA's advice in a timely manner. These officials said that the delays occurred often enough to be of concern to them, and in some cases, they have had to rely on data from industry or another agency, such as the U.S. Copyright Office. Of course, some of their concerns might be based on requests that OLIA could not reasonably meet within the deadlines requested, but we could not determine that without documentation. These delays, as well as the uncertainties in determining the reasons for the delays, may have been attributable, in part, to OLIA's lack of control and documentation of requests for advice, and significant improvements might have been realized if a tracking system had been in place, with target dates for completion established for each assignment. OLIA's new tracking system tracks due dates and completion dates for each staff person's projects.

As noted earlier, OLIA, industry, and other federal officials expect that requests from developing countries for training from OLIA will increase now that the January 2000 TRIPS compliance date for developing countries has passed. In addition, as more developing countries submit draft legislation to be reviewed by the United States, there will be increased requests from other agencies for OLIA's legal and technical expertise. OLIA officials claim that they need more resources to monitor compliance activities in developing countries and in emerging areas of intellectual property. But they were unable to provide documentation that could support their claim.

We recognize that OLIA cannot control the number and nature of incoming requests from other agencies, and these requests will often be oral and urgent. However, OLIA should ensure that requests for advice are adequately controlled, so that resources are used in the most efficient and effective manner, and to enable OLIA staff to refer to documented files in the future. As our fieldwork ended, OLIA established procedures to track requests through an automated system. These procedures should enable OLIA to monitor and prioritize requests and assignments, perform a workload assessment of its duties and responsibilities, determine resource allocation, and document whether additional resources are needed.

OLIA also needs to improve its documentation of analyses of draft foreign laws and regulations governing intellectual property rights, because the analyses might form the basis for future enforcement action. OLIA reported that it conducted 58 analyses of individual countries' draft laws and regulations during fiscal years 1997 through 1999 (15 in fiscal year 1997, 20 in fiscal year 1998, and 23 in fiscal year 1999). We selected four analyses (Hong Kong, Colombia, Vietnam, and Ecuador) from a February 19, 1999, USTR press release announcing the results of Special 301 reviews. We selected six other analyses (Brazil, India, Jordan, Nicaragua, Paraguay, and another for Ecuador in March 1999) from the list of the 23 analyses conducted during fiscal year 1999. We selected Brazil and India specifically because the study by the International Intellectual Property Alliance of copyright piracy losses (see page 4) named those two countries

as the top offenders. We then asked OLIA for documentation of the 10 analyses. The only documentation in OLIA's files was for the March 1999 analysis of Ecuador's patent regulations.

Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office direct the Administrator of the Office of Legislative and International Affairs to:

1. Ensure that requests by other federal agencies for advice and analysis are documented, prioritized, and monitored. Based on the results of the tracking procedures, OLIA could then perform a workload assessment to determine its resource requirements.
2. Document OLIA's analyses of draft foreign laws and regulations governing intellectual property rights.

PTO Response and OIG Analysis

PTO generally agreed with the findings and recommendations and requested minor changes. We agree with the changes and have incorporated them into the final report.

III. OLIA Should Initiate Discussions Toward a Strategy to Monitor and Report TRIPS Compliance by Developing Countries

Although USPTO is mandated by the 1999 Reform Act to advise executive branch agencies on intellectual property issues, there is no requirement in U.S. trade law or the TRIPS Agreement that OLIA systematically monitor and periodically report compliance prior to the agreement deadlines of January 1, 2000, for developing countries, and January 1, 2006, for least-developed countries.¹¹ The developing countries are the largest group of countries contributing to the estimated losses from copyright piracy. In the absence of such a requirement, OLIA has reviewed developing countries' draft legislation on a country-by-country basis upon request, but has not analyzed all such countries' compliance since the agreement's implementation in 1995. As a result, OLIA is unable to provide an assessment of these countries' legal and technical compliance at any given moment from 1995 to 2000. Such a report, though not legally required, would have provided a stronger basis for determinations of policy initiatives and for efficiently allocating training and enforcement resources.

Officials of trade associations have emphasized the importance of TRIPS compliance to protect intellectual property rights, and a recent General Accounting Office (GAO) report recommended a better strategy for managing the growing compliance and enforcement workload for all trade agreements.¹² With an improved strategy for monitoring and reporting compliance by developing countries, OLIA and USPTO will be better able to fulfill the advisory mission mandated in the 1999 Reform Act. OLIA, USTR, and the other government agencies will then have more complete information with which to formulate policies and enforcement mechanisms to protect intellectual property rights in those countries. Additionally, OLIA's training funds will be more efficiently allocated to the most critical countries and issues.

Although OLIA conducted 58 individual country analyses during fiscal years 1997 through 1999, these covered only 19 WTO-member developing countries, a fraction of the 75 to 80 countries that, according to OLIA, were subject to the January 1, 2000, deadline. USTR, as the agency authorized to identify foreign countries that deny protection of intellectual property rights and

¹¹ Members of WTO, other than those clearly of advanced development such as the United States or those identified by the United Nations as least-developed countries, determine for themselves if they will be treated as developing countries or countries in transition to a market economy. For example, Hong Kong maintains developing country status.

¹² *International Trade: Strategy Needed to Better Monitor and Enforce Trade Agreements*, NSIAD-00-76, <http://www.gao.gov/new.items/ns00076.pdf>.

annually report on progress in securing protection,¹³ is now coordinating the only comprehensive review of developing countries' compliance since implementation of the TRIPS Agreement. Trade associations and embassy personnel at foreign posts submitted information on the progress by host countries in passing legislation required to become compliant. The Trade Compliance Center of the International Trade Administration (ITA) was designated to assemble the submissions, which consisted of only summary descriptions of the host country's legislation on intellectual property rights and a table indicating the legislative status in a number of intellectual property rights areas. However, Trade Compliance Center officials did not evaluate whether the legislation was compliant with the agreement. According to Trade Compliance Center and USTR officials, that task will be done by the OLIA staff, since they have the expertise to determine whether a country has enacted the appropriate laws for protecting intellectual property rights and the means of enforcing those laws.

Officials of trade associations with intellectual property rights interests told us that it is crucial for the U.S. government to encourage compliance with the TRIPS Agreement to protect intellectual property rights and reduce the risk of trade losses due to piracy. As stated on page 4, U.S. copyright-based industries suffered estimated trade losses due to piracy of more than \$12 billion in 62 selected countries in 1998. Of these 62 countries, 42 are developing countries, such as China, Brazil, Indonesia, Russia, and Mexico. In total, the 42 developing countries were responsible for almost \$8.8 billion of the estimated trade losses. The American Intellectual Property Law Association testified that neither the difficulties in implementing the obligations of TRIPS, nor the challenge that the United States faces in ensuring that WTO members properly implement their TRIPS obligations, can be overstated.¹⁴ OLIA and trade association representatives told us that the U.S. government agencies involved in TRIPS issues, including OLIA, should do more, including hiring additional staff and possibly stationing compliance personnel overseas, to protect intellectual property rights in overseas markets.

The GAO report mentioned above assessed the federal structure for monitoring all foreign trade agreements, the complexity of the monitoring task and activities needed, and the capacity of USTR, the Commerce Department, and the Agriculture Department to handle the monitoring workload. Although GAO did not specifically review the extent of TRIPS compliance activities, their findings parallel the conditions reported to us by other government and trade association officials. GAO found that recent declining staff levels and the unavailability of analytical expertise limit the agencies' ability to handle a growing monitoring workload. Although the

¹³ Section 1303 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418) and Section 313 of the 1994 Uruguay Round Agreements Act (P.L. 103-465). See pages 5 and 6 above for more details.

¹⁴ Testimony by Michael K. Kirk, Executive Director, American Intellectual Property Law Association, before the Honorable Philip M. Crane, Chairman, Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives, August 4, 1999.

agencies recently held discussions to identify additional resources needed for monitoring activities, they have not addressed how to manage the workload, what skills are needed and available in the future, or whether federal efforts are targeted at the areas of greatest risk. GAO recommended that USTR and the Commerce and Agriculture Departments “jointly develop a strategy to better manage the U.S. government’s growing trade agreement monitoring and enforcement workload.”¹⁵

OLIA has not discussed, with the other U.S. government agencies, the development of a strategy to monitor compliance by all developing countries. Implementing such a strategy, in conjunction with USTR and the other agencies involved, would better enable OLIA to fulfill the advisory mission mandated in the 1999 Reform Act with respect to those countries. The act authorizes USPTO to conduct programs regarding international intellectual property law and the effectiveness of intellectual property protection domestically and throughout the world. A strategy that utilizes OLIA’s expertise to periodically determine the extent of legal and technical compliance would assist USTR in its determinations of the status of intellectual property rights protection in those countries and the appropriate enforcement tools. Developing countries, as the largest group contributing to piracy losses, should be the initial focus of OLIA’s efforts, without ignoring other countries’ compliance with the TRIPS Agreement.

As noted above, OLIA began its enforcement training program about three years ago, and has conducted an increasing number of training sessions for developing countries. OLIA already receives more requests for training than it can meet, and officials at OLIA and other federal agencies expect requests for training to increase. OLIA cannot determine what future training efforts are needed to achieve compliance by all developing countries, unless it first determines the extent of their compliance at this point. By initiating discussions toward a strategy to monitor and report developing members’ compliance, OLIA would be taking the first step toward prioritizing its training efforts for such countries.

Recommendation

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office direct the Administrator of the Office of Legislative and International Affairs to initiate discussions with ITA, USTR, and the other government agencies involved in TRIPS compliance matters toward a strategy to monitor and report compliance by developing countries with the TRIPS Agreement.

¹⁵ *International Trade: Strategy Needed to Better Monitor and Enforce Trade Agreements*, pages 3 and 5.

PTO Response and OIG Analysis

PTO generally agreed with the findings and recommendations and requested minor changes. We agree with the changes and have incorporated them into the final report.



APPENDIX A

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

JUL 20 2000

MEMORANDUM FOR: Mary L. Casey
Acting Assistant Inspector General for Auditing
Office of the Inspector General

FROM: H. Dieter Hoinkes 
Deputy Administrator for External Affairs

SUBJECT: Draft Audit Report: BTD-11747

This is to inform you that on July 10, 2000, I had the opportunity to meet with Andy Cochran and his staff to discuss the subject draft report. We provided a number of written comments and suggestions on the report that will be considered for inclusion in the final report.

We are pleased with the cooperation that your office has extended to us and would appreciate the opportunity to see the report in its final form.

cc: Mr. Robert Stoll
Mr. Dan Haigler

Acronyms

GAO	General Accounting Office
GPRA	Government Performance and Results Act of 1993
IIPA	International Intellectual Property Alliance
ITA	International Trade Administration
OLIA	Office of International and Legislative Affairs
TRIPS	Trade-Related Aspects of Intellectual Property Rights
USPTO	United States Patent and Trademark Office
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization